

SUPREME COURT OF THE UNITED STATES.

No. 345.—OCTOBER TERM, 1924.

A. J. Buck, Appellant,	}	Appeal from the District Court of the United States for the Western District of Washington.
vs.		
E. V. Kuykendall, Director of Public Works of the State of Washington.		

[March 2, 1925.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an appeal, under § 238 of the Judicial Code, from a final decree of the federal court for western Washington dismissing a bill brought to enjoin the enforcement of § 4 of chapter 111 of the Laws of Washington, 1921. That section prohibits common carriers for hire from using the highways by auto vehicles between fixed termini or over regular routes, without having first obtained from the Director of Public Works a certificate declaring that public convenience and necessity require such operation. The highest court of the State has construed the section as applying to common carriers engaged exclusively in interstate commerce. *Northern Pacific Ry. Co. v. Schoenfeldt*, 123 Wash. 579; *Schmidt v. Department of Public Works*, 123 Wash. 705. The main question for decision is whether the statute so construed and applied is consistent with the Federal Constitution and the legislation of Congress.

Buck, a citizen of Washington, wished to operate an auto stage line over the Pacific Highway between Seattle, Washington and Portland, Oregon, as a common carrier for hire exclusively for through interstate passengers and express. He obtained from Oregon the license prescribed by its laws. Having complied with the laws of Washington relating to motor vehicles, their owners and drivers (*Carlsen v. Cooney*, 123 Wash. 441), and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied there for the prescribed certificate of public convenience and necessity. It was refused. The

ground of refusal was that, under the laws of the State, the certificate may not be granted for any territory which is already being adequately served by the holder of a certificate; and that, in addition to frequent steam railroad service, adequate transportation facilities between Seattle and Portland were already being provided by means of four connecting auto stage lines, all of which held such certificates from the State of Washington.¹ *Re Buck*, P. U. R. 1923 E, 737. To enjoin interference by its officials with the operation of the projected line, Buck brought this suit against Kuykendall, the Director of Public Works. The case was first heard, under § 266 of the Judicial Code, before three judges, on an application for a preliminary injunction. They denied the application. 295 Fed. 197. A further application for the injunction made after amending the bill was likewise denied. 295 Fed. 203. Then the case was heard by the District Judge upon a motion to dismiss the amended bill. The final decree dismissing the bill was entered without further opinion. See also *Interstate Motor Transit Co. v. Kuykendall*, 284 Fed. 882.

That part of the Pacific Highway which lies within the State of Washington was built by it with federal aid pursuant to the Act of July 11, 1916, c. 241, 39 Stat. 355, as amended February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act, November 9, 1921, c. 119, 42 Stat. 212. Plaintiff claimed that the action taken by the Washington officials, and threatened, violates rights conferred by these federal acts and guaranteed both by the Fourteenth Amendment and the Commerce Clause. In support of the decree dismissing the bill this argument is made. The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare *Crandall v. Nevada*, 6 Wall. 35. A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld

¹An additional ground for refusing the certificate was that the applicant did not appear to have financial ability. This ground of rejection does not require separate consideration; among other reasons, because the plaintiff later asserted, in his bill, that he possessed the requisite financial ability, and the motion to dismiss admitted the allegation.

by the State in its discretion, without violating either the due process clause or the equal protection clause. *Packard v. Banton*, 264 U. S. 140, 144. The highways belong to the State. It may make provision appropriate for securing the safety and convenience of the public in the use of them. *Kane v. New Jersey*, 242 U. S. 160. It may impose fees with a view both to raising funds to defray the cost of supervision and maintenance and to obtaining compensation for the use of the road facilities provided. *Hendrick v. Maryland*, 235 U. S. 610. See also *Pierce Oil Corporation v. Hopkins*, 264 U. S. 137. With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co. v. Public Service Commission*, 242 U. S. 255; *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat., § 3964; Act of March 1, 1884, c. 9, 23 Stat. 3, do that. The state statute is not objectionable because it is designed primarily to promote good service by excluding unnecessary competing carriers. That purpose also is within the State's police power.

The argument is not sound. It may be assumed that § 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission v. Duke*, No. 283, decided January 12, 1925. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a

test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which, despite existing facilities, ~~declared that~~ public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is no merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. It also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways.

By motion to dismiss filed in this Court, the State makes the further contention that Buck is estopped from seeking relief against the provisions of § 4. The argument is this: Buck's claim is not that the Department's action is unconstitutional because arbitrary or unreasonable. It is that § 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provisions of a law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot in the same proceeding both assail a statute and rely upon it. *Hurley v. Commissioner of Fisheries*, 257 U. S. 223, 225. Compare *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407, 411. Nor can one who avails himself of the benefits conferred by a statute deny its validity. *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125; *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469, 472. But in the case at bar, Buck does not rely upon any provision of the statute assailed; and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all laws relating to common carriers. But the permission sought was denied. The case presents no element of estoppel. Compare *Arizona v. Copper Queen Mining Co.*, 233 U. S. 87, 94 *et seq.*

Reversed.

may be deemed equivalent to a legislative declaration that